

Exhibit A

C5TJGAR1

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

11 Cr. 989 JSR

5 WALTER GARCIA,

6 Defendant.

7 -----x

8
9 May 29, 2012
5:24 p.m.

10
11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14
15 APPEARANCES

16 PREET BHARARA,
United States Attorney for the
17 Southern District of New York
DAVID MILLER,
18 KAN MIN NAWADAY,
Assistant United States Attorneys

19 PRYOR CASHMAN, LLP
Attorneys for defendant Garcia
20 BY: ROBERT WILLIAM RAY, Esq.
21 MADELON ANNE GUATHIER, Esq.
Of counsel

22 Also Present:

23 NANCY FESTINGER, Official Certified Spanish Interpreter
24 DAVID MINTZ, Official Certified Spanish Interpreter

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1 (In open court)

2 (Case called)

3 THE COURT: Good afternoon. Please be seated.

4 All right. We're here for sentence. Let me first
5 find out from defense counsel whether the defendant has read
6 and discussed with counsel the presentence report?

7 MR. RAY: We have, your Honor. Mr. Garcia has
8 received the presentence report. I have reviewed it with him.
9 We have filed various objections to that report.

10 THE COURT: Yes. I'll get to that in a minute. I
11 want to make sure he and you have reviewed it?

12 MR. RAY: Yes.

13 THE COURT: Are there any objections other than those
14 that you've already put forth in writing?

15 MR. RAY: I do not believe so, no, your Honor.

16 THE COURT: We'll get to those in a minute. Any
17 objections from the government?

18 MR. MILLER: None from the government, your Honor.

19 THE COURT: I think the two objections we need to deal
20 with in terms of the guideline calculation are:

21 First, with respect to Paragraph 40, the defense
22 objects to the increase of four levels based on Garcia being an
23 organizer or leader of criminal activity that involved five or
24 more participants, and specifically the allegation is that
25 Garcia and Batista, who if I recall correctly, didn't get this

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1 four level increase from one of my colleagues.

2 MR. MILLER: Correct, your Honor.

3 THE COURT: Recruited Parra-DeJesus, Kenny Vargas and
4 Jose Urena to travel to Philadelphia to Kidnap the victim or
5 his brother. I am inclined to give that increase, but let me
6 hear from defense counsel if there is anything more he wants to
7 say about that?

8 MR. RAY: Your Honor, we made that a principal
9 objection in the written objections to the presentence report
10 and have also submitted, as I know your Honor has received, a
11 sentencing submission to that effect.

12 THE COURT: Yes.

13 MR. RAY: I don't need to be repetitive late in the
14 hour this evening, but I do wish to point out that, so that the
15 record is clear, we made a distinction, and this will come up
16 later in the argument, about where we were prepared to go as
17 part of a proposed plea bargain, a proposed stipulation Mr.
18 Garcia was, in fact, the organizer or leader of narcotics
19 trafficking activity, but not with respect to the kidnapping.

20 It makes a significant difference here because the
21 base offense level and adjustment for ransom with regard to the
22 kidnapping guidelines are so much higher than would otherwise
23 be the case with regard to the narcotics trafficking
24 guidelines.

25 Having said that, and I realize it is a fine

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1 distinction, let's go to the facts presented at trial. Who
2 brought in all of these other people to the kidnapping
3 conspiracy? Not my client. The witnesses were quite clear as
4 to who was responsible for those other participants in the
5 conspiracy.

6 Marco Batista brought those individuals in. He
7 brought those individuals in for a purpose, which was to commit
8 the violence aspect of a violent crime, holding weapons, taking
9 the victim, holding the victim with the use of weapons,
10 transporting the victim in a car which was the same vehicle
11 that was used to conceal the weapons in the first place, the
12 Ford Explorer which had the trap, all in Marco Batista's car.

13 It is Marco Batista together with these other people
14 who are the ones responsible for what actually transpires,
15 i.e., the kidnapping and the act of violence itself. This was
16 not something that my client did. My client was involved, as I
17 think the testimony --

18 THE COURT: No. The question is not whether he did
19 it; the question is whether he helped to organize the group
20 that did it.

21 MR. RAY: I think that is fair, but I think in that
22 regard, to answer your Honor's question, he held Marco Batista
23 accountable for losing drugs or letting drugs go that weren't
24 paid for, and I think it is probably fair from the testimony to
25 characterize that as Marco Batista would have to do something

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1 about it.

2 THE COURT: Like murder!

3 MR. RAY: Well, it wasn't clear what was to be done
4 about it except that he was the one that he looked to because
5 he was the one who had the drugs and brought all of these other
6 people in that my client didn't know. In that sense Marco
7 Batista was responsible for this deal, but the narcotics came
8 from a supplier, and Marco Batista was a substantial narcotics
9 trafficker in his own right.

10 THE COURT: Let me hear from the government.

11 Thank you.

12 MR. MILLER: Thank your Honor.

13 Your Honor, as we set forth in our submission and as
14 your Honor, of course, heard from the testimony at trial, Mr.
15 Garcia was, like Mr. Batista, an organizer not only with
16 respect to the narcotics activity but the kidnapping activity.

17 Even if he wasn't the one who specifically went to
18 Kenny Vargas, for example, and said you want to come help me
19 grab this guy in Philadelphia -- and Mr. Vargas did that
20 because he had dealt with Mr. Batista in the past and knew
21 there were benefits to doing that -- that doesn't mean he
22 wasn't a leader of this kidnapping conspiracy.

23 We know, for example, from the testimony of Felix
24 Tineo, which the government would submit was credible, that Mr.
25 Garcia, in Mr. Tineo's presence, in Mr. DeJesus' presence and

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1 certainly with Mr. Batista, held Mr. Batista to account for
2 things, said basically this is your fault, made reference to
3 the fact that they would if necessary have to kill either the
4 victim or the individual who stole the drugs, and set in motion
5 the entire kidnapping conspiracy which he actively participated
6 in by going to Philadelphia.

7 He wasn't some passive passenger during this entire
8 kidnapping conspiracy. It was his drugs, and Mr. Batista was
9 going to get a cut of that. Mr. Batista worked for Mr. Garcia
10 and knew he better do what Mr. Garcia said, and he did it. Mr.
11 Garcia, as you may remember, when they went to rent the U-Haul
12 truck, Mr. Garcia and Mr. Batista basically directed others to
13 go and put some money on the Citibank card, which Mr. Urena
14 did.

15 Parra-DeJesus rented the U-Haul truck and Mr. Batista
16 and Mr. Garcia sat and ate in a Subway shop while this was
17 happening because they were the ones who set the others in
18 motion to do the kidnapping.

19 Mr. Batista surely was present in the basement during
20 the evening when Mr. Garcia was not, but that certainly does
21 not make him any less of a leader merely because he wasn't
22 present for the entire evening in the basement. So I know your
23 Honor's very well aware of the facts.

24 THE COURT: This is not a case where I have to have a
25 Fatigo hearing because the trial provided me with all of the

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1 relevant facts. I understand the defense position, put forth
2 as always with considerable eloquence and skill, but I find the
3 facts that were before me that the evidence was certainly more
4 than a preponderance of the evidence that Mr. Garcia played a
5 leadership and organizing role in the kidnapping, so I accept
6 the four-point adjustment.

7 Now, a different question, one I think is much more
8 difficult, is whether this should be the unusual case where
9 even though the defendant went to trial, that there should be
10 an adjustment for acceptance of responsibility.

11 What makes that difficult is that in the sealed
12 proceedings that the government, of course, did not have access
13 to that preceded the trial when there was a question raised by
14 the defendant regarding counsel, he effectively admitted his
15 guilt except for the gun counts. Of course, it was the gun
16 counts he was acquitted on.

17 On the other hand, he chose -- presumably because for
18 appeal purposes -- not to make any public statement when he was
19 interviewed by Probation or otherwise.

20 So in one sense he's accepted responsibility in a very
21 unusual way in a sealed proceeding, and in another way he has
22 not shown acceptance in any public way. For sure he's not
23 entitled to the third point for acceptance of responsibility
24 because that point relates to whether or not he saved the
25 government from having to go to trial, which he clearly did

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1 not. So we're talking here I think two points at most.

2 So let me hear from defense counsel and government
3 counsel on this.

4 MR. RAY: Well, I would say with regard to the third
5 point, I guess I take the point in the sense that there was a
6 trial. On the other hand --

7 THE COURT: The third point is really designed if
8 you're going to save the government from its resources, its
9 time and all things like that.

10 MR. RAY: I don't want to belabor it. Our point all
11 along in connection with arguing for this unusual exceptional
12 deduction even in the event of a trial was essentially to put
13 the defendant back in the same position he would have been if
14 he had gotten the plea offer frankly that we submit should have
15 been extended.

16 THE COURT: But that is not the test.

17 I doubt you can show me anything that tells me that's
18 the test. Moreover, it is not like the situation which does
19 arise under the guidelines where someone after being convicted
20 at trial admits, publicly admits and accepts his guilt. He has
21 tried to have it both ways, which I fully understand. I am not
22 faulting him for that, but it's not at all what the guidelines
23 contemplate.

24 MR. RAY: On the trying have it both ways part, even
25 if the sealed portion were unsealed, and although this still

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1 presents some problems under the guidelines, it is clear that
2 he was accepting responsibility for what at least he believed
3 he did based upon what the offer extended was at the time which
4 included only a narcotics conspiracy count and a firearms
5 count.

6 I don't think Mr. Garcia has any problem about that,
7 that record being unsealed. The problem is to turn what
8 otherwise was nonpublic into public. The problem he is --

9 THE COURT: Wait. Take this one step at a time. Do
10 you want this sealed record unsealed?

11 MR. RAY: If I may have a moment?

12 THE COURT: Of course.

13 (Off-the-record discussion)

14 MR. RAY: No, your Honor, I think, having consulted
15 with my client, I perhaps spoke too soon. I think he wants to
16 preserve the sealed record, and so we are going to be left with
17 arguing from the public record.

18 THE COURT: So in the public record I don't see any
19 indication of acceptance of responsibility.

20 MR. RAY: Well, as you have correctly recognized, the
21 difficulty is he is faced with a sentencing guidelines
22 calculation which is life, a recommendation which the
23 government proposes should be a sentence your Honor imposes, a
24 recommended sentence from the U.S. Probation Office, which is
25 300 months or 25 years, and in any event, even under my

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1 calculation and proposal to the court, between 210 and 228
2 months. It is a significant thing indeed for the defendant to
3 essentially waive whatever rights he might have on appeal by
4 accepting responsibility now.

5 THE COURT: I am not sure it waives -- it certainly
6 doesn't waive his right of appeal.

7 MR. RAY: No. The word I used was, "Jeopardize."

8 THE COURT: It might impact, I grant you that, and so
9 I am perfectly happy with your decision. Your client should
10 know this, if this is any solace to him, there is probably no
11 judge in this Court who is less enamoured of the guidelines
12 than this one, but I still am required by law to calculate
13 them. So, but on that record I don't think you have any ground
14 really for saying acceptance of responsibility once that record
15 is sealed or remains sealed.

16 MR. RAY: I guess except what is not sealed is his
17 willingness, since he signed the plea agreement, to have
18 entered a plea if the plea had not included the gun charge.

19 Whatever his statements may have been about, you know,
20 affirmatively acknowledging and accepting his responsibility,
21 there is no question his actions are just as significant, and
22 the guidelines make the point particularly in this context,
23 when a court considers post-trial whether or not acceptance of
24 responsibility in the unusual case should be granted to focus
25 specifically on pretrial positions with regard to that issue,

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1 not whatever the defendant may have said after a jury's verdict
2 has been rendered against him.

3 THE COURT: I hear all of that but, on the other hand,
4 in the normal situation if there was an acceptance of
5 responsibility, the court would have a full colloquy. I leave
6 this to the Probation Office when I can, but for whatever
7 reason the defendant doesn't want to talk to the Probation
8 Office, which is totally his right, but he still wants an
9 acceptance of responsibility.

10 Now I will have a colloquy with him. For example, I'd
11 be asking your client all sorts of things about the events, the
12 underlying events which you tell me, but I infer from what you
13 just said about keeping the record sealed, he is not about to
14 want to answer all of that, and I won't hold that against him
15 in any way, shape or form.

16 MR. RAY: I want to be clear, your Honor, his decision
17 is that he will not answer those questions. I don't want to
18 belabor the point.

19 THE COURT: I don't think the mere fact he signed that
20 agreement is an adequate factual basis on all of these facts
21 and circumstances to give him credit for acceptance of
22 responsibility.

23 MR. RAY: I will add, since it is a significant point,
24 that the posture that Mr. Garcia takes, it should be noted, is
25 contrary to the advice of counsel.

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1 I have labored, but it is ultimately his decision to
2 understand the distinction between just the issue that your
3 Honor faces on the one hand, a close call where a court might
4 otherwise be willing in the exception case of this one, to
5 grant acceptance of responsibility credit, but the defendant
6 can't have it both ways. He will have to acknowledge now he is
7 responsible and the court will give consideration, but if he
8 declines to do so in order to preserve what he believes is a
9 justifiable appeal and to not run that risk, that certainly is
10 his right to do so, but it comes as some consequence.

11 THE COURT: That is fair enough. I am glad you placed
12 all of that on the record.

13 So the court concludes that the total offense level is
14 44, the criminal history category is I, and the guideline range
15 which is not binding on the court but which the court must
16 consider is life in prison.

17 However, the Probation Office recommends 300 months,
18 and it is certainly notable that though every sentence is
19 different and must be considered on its own terms, that Judge
20 Sullivan, yes, sentenced Marco Batista to 244 months of
21 imprisonment and Judge Scheindlin sentenced Parra-DeJesus to
22 144 months of imprisonment, both of which were non-guideline
23 sentences. So that has to be taken into account by the court
24 as well.

25 So on what the sentence should be under Section 3553

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1 (a), let me hear first from defense counsel, then from
2 government counsel, and then from the defendant if he wishes to
3 be heard.

4 MR. RAY: Your Honor, under 3553 (a), one of the
5 significant factors to be considered, obviously not the only
6 one, I think it bears emphasis on precisely this determination,
7 is to avoid unwarranted sentencing disparities, the keyword
8 being "unwarranted," and although I understand your Honor has
9 passed upon supervisory adjustment under the guidelines, I
10 think the role with regard to my client's involvement in the
11 offenses that led to his conviction is still nevertheless
12 germane to this determination from the standpoint of arriving
13 at an appropriate sentence and in consideration of the variance
14 factors.

15 I say that also mindful how we find ourselves in this
16 place in the first place, which is to say, it wasn't that long
17 ago when the guidelines were enacted and first came into
18 regular use in courthouses throughout this district, but the
19 difference between going to trial and pleading guilty was
20 largely two offense levels, and a conviction typically meant
21 the difference between the bottom and the top of the originally
22 set guideline range to which the defendant would have been
23 entitled as a result of his guilty plea.

24 A long way away from that, and I am not suggesting it
25 is not appropriate for the Congress and Sentencing Commission

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1 to stray from that original intent, but just for the sake of
2 disparity, look at where we find ourselves. Mr. Garcia would
3 have been in the range of somewhere in the neighborhood of 195
4 to 228 months even if he pleaded guilty to the gun charge on
5 the offer that the government originally made. He declined for
6 reasons that I think we now know were good ones. He didn't
7 want to plead something to something he didn't do. He rejected
8 that offer.

9 Going to trial means he faces a guideline sentence of
10 life and sentencing calculation of 300 months with a principal
11 co-defendant responsible for really the violent aspect of the
12 kidnapping, who got a sentence of 244 months.

13 THE COURT: So I agree largely with what you're saying
14 there in the sense that here, as in so many places, I find the
15 guidelines very difficult to justify, to understand what began
16 as an attempt to do away with disparities has led to all sorts
17 of disparities, many of them inexplicable.

18 The one you're focusing on is if you might say the
19 historical disparities, for example, between 1987 and the
20 present, the guideline calculations for someone who commits a
21 fraud of a million dollars and has no prior criminal offense
22 has increased under the guidelines 500 percent.

23 Has the crime charged changed so dramatically in 20
24 years that it is five times worse than the Sentencing
25 Commission thought it was in 1987? That is preposterous.

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2 MR. RAY: Although public sentiment apparently has
3 changed.

4 THE COURT: The public sentiment has a role to play,
5 but the last I heard law, justice and reason were supposed to
6 be what guided all of us. Along the lines of what you're
7 talking about, where does the Sentencing Commission get these
8 numbers two points here, four points here, three points there?
9 They pick them out of thin air. They never offer the slightest
10 rationale, but they always justify them because they're this
11 year's attempt to avoid disparities.

12 Perhaps one of the worst things about the guidelines
13 is they focus much more narrowly on the relevant factors than
14 does Section 3553 (a), which is the overriding guiding message
15 guiding, as the Supreme Court has so eloquently noted, the
16 guidelines are just one aspect of this.

17 To make that one aspect which plays a secondary role
18 even in the wording of Section 3553 (a) such a mantra, such a
19 blind prescription that the government feels so compelled to
20 adhere to in all but the most exceptional cases is what is
21 again to substitute non-think for reason. So you don't need to
22 convince me about the guidelines. What you need to convince me
23 is -- and I think you may have some difficulty -- is that Mr.
24 Garcia is not a very bad man.

25 The proof of it, in addition to the overall situation

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1 that he found himself in and that he helped in the court's view
2 organize and direct and lead, is that I read many of his
3 statements as saying he wanted to murder the people who stole
4 his drugs or their family, forget about even the immediate
5 person who was giving him a problem, we're drug dealers, let's
6 go after the family, let's murder them, too. I am overstating
7 it, but that's the thrust that comes out loud and clear, it
8 seems to me, from a lot of the evidence in this case.

9 It is hard to gel that with the kind of sentence
10 you're proposing.

11 MR. RAY: I will say that was different from
12 cooperating witnesses, the best evidence of where he stood on
13 that, though, I think remains in the tape recordings and
14 transcripts themselves in which the subject comes up by the
15 brother of the victim on one occasion, and the implication
16 being, you know, what if I, you know, what if I don't come up
17 with what you're after, what are you going to do to my brother?

18 And Mr. Garcia is on the telephone saying or denying
19 that it meant what the person on the other end of the phone was
20 concerned about, which is you're going to kill me. He says no,
21 no, no, no, not that at all. Look, what the truth is between
22 that and whatever those witnesses testified to at trial, I know
23 your Honor has a record, I was there, I heard it, too.

24 I would suggest, your Honor, be careful about that and
25 Mr. Garcia is on that phone, too, I think insistent that this

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1 be taken care of, but don't think Mr. Garcia was prepared to go
2 there, I submit to you. It also was true, unquestionably true,
3 Mr. Garcia was not responsible for the people that were brought
4 into this thing including the people with guns. That was Mr.
5 Batista's role. That is what he did.

6 I understand your Honor's made a finding about leading
7 and supervising this activity and about bringing --

8 THE COURT: You're saying in a more narrow sense.

9 MR. RAY: I am saying in a more narrow sense. I
10 understand there is an accountability here for the kidnapping
11 and conspiracy charge. I am talking about the aspect of the
12 conspiracy directed simply to the question of the ability,
13 preparation for and willingness to use violence and threats
14 pertaining thereto, and I think if you examine carefully this
15 record, I don't think there is enough of a record here to make
16 a finding, however, you want to characterize it, about my
17 client being a very bad man, meaning somebody prepared to kill
18 in order to get what he wanted here. I don't think that is Mr.
19 Garcia. In any event, if I can make one more large argument
20 about the guidelines and I am done with it.

21 I am not here to argue for leniency under the
22 kidnapping guidelines for all offenses. I am here representing
23 my client. That is all I should be doing. There is another
24 principle of the guidelines, and that was that the guidelines
25 at least in the main are designed to yield sentences at or near

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1 the statutory maximum when the defendant's prior criminal
2 history warrants it. The government can make whatever
3 arguments they can to make why my client doesn't have a prior
4 criminal.

5 He is a 62-year-old man and U.S. Citizen, never been
6 previously convicted of an offense. He has one charge in
7 Queens that I will deal with at the conclusion. There is one
8 aspect your Honor should consider I made in the sentencing
9 submission I made for downward departure so he can get credit
10 for 11 months in state custody he otherwise won't get credit
11 for.

12 This is one of the strange aspects of joint federal
13 state things. If your Honor doesn't give him credit for that
14 11 months worth of time, nobody else can. Even if the state
15 judge later on decides you know what, I think he suffered
16 enough, I will order his time run concurrently, a state judge
17 doesn't have the power to do that.

18 THE COURT: I think we need to take that up, but I
19 agree with you, that is the end of the -- the tail wagging the
20 dog, so to speak.

21 MR. RAY: Right. I have bigger things to worry about.
22 I have a potential life sentence here, 300 month
23 recommendation. I would suggest my second point, in addition
24 to just the aspect of the kidnapping guidelines which I think
25 are excessive as applied to Mr. Garcia, I think there is a

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1 particular aspect of it being excessive. He doesn't have a
2 prior criminal record. Somebody without a prior criminal
3 record except for the extraordinarily unusual case should not
4 be facing under the guidelines life imprisonment. That is not
5 generally how it is supposed to work.

6 I can imagine a particularly --

7 THE COURT: Actually, you see, the irony is that it
8 happens all the time these days and not just in violent cases
9 and not just -- and many fraud cases involving people with no,
10 unquestionably no prior criminal activity because in the fraud
11 area sentences are driven by the amount of the fraud.

12 In a case I had that is somewhat well known or
13 infamous in the government's eyes, the Adelson case, the
14 guideline range for Mr. Adelson, a white collar criminal with
15 no prior convictions was life in imprisonment. The statutory
16 maximum was 80, so the government took a more modest view than
17 if he had -- since he was 40 years' old, the government
18 figured, you know, you can give him 80 years and he still might
19 get out at the age of 120.

20 And in narcotics cases where it is the weight of the
21 drugs that most drives, you'd be surprised how many people
22 without a prior conviction have a guideline range of life
23 imprisonment. I think you're beating a dead horse. It is not
24 the guidelines that is driving this sentence. I hope I've made
25 that clear. It is the factors under Section 3553 (a).

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1 If, for example, a fair reading of the evidence is
2 that your client did intend not only to Kidnap but to murder if
3 necessary not just the person he was after but even members of
4 his family, assuming hypothetically that were the case, life
5 imprisonment would not be farfetched at all.

6 I was a little taken aback by the comments of my very
7 excellent and much respected colleague, Judge Scheindlin, who
8 suggested in her sentence that basically when your victim is
9 someone involved in the narcotics trade, it is not the same.
10 The last I checked, a human life is a human life.

11 MR. RAY: Your Honor may note that if it is not
12 obvious by implication, I will tell you explicitly that was not
13 a place I was prepared to go.

14 THE COURT: I didn't anyway. Let me me shut up.

15 MR. RAY: The 3553 (a) factors I suggest, your Honor,
16 should appropriately conclude on the evidence my client was
17 more than willing to threaten in order to accomplish the
18 objective of the kidnapping conspiracy, but I would submit to
19 you that he was not prepared to carry that out. I believe that
20 is supported by the taped transcripts.

21 There is a distinction between threatening bad things
22 and actually being someone who is prepared to use the means to
23 carry that out. As I suggested to your Honor before, I don't
24 believe that that is my client. I think he was insistent this
25 had to be resolved, and he had to answer to other people to

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1 make sure that it was resolved, but I don't think murder was a
2 place he was prepared to go. He was prepared to threaten in
3 order to carry out his objective because I think that is what
4 the trial evidence supports, but I don't think a further
5 finding beyond that is warranted, and I would suggest under
6 3553 (a) that that is a distinction with a difference that your
7 Honor should credit.

8 I think further that my client is 62 years' old, he
9 suffers from cancer. My understanding, I don't know the
10 specific results, but that at least in part prostate cancer has
11 returned in the sense it has spread. He otherwise is not in
12 great health.

13 That is a factor, I understand not the only factor to
14 be considered, but in weighing what an appropriate and
15 fashioning an appropriate sentence here, obviously if the
16 sentence your Honor imposes is effectively tantamount of life,
17 my client's view is what is the difference. I don't believe he
18 will survive, as I argued in the sentencing memorandum, a
19 sentence longer than what I had imagined before, which would be
20 the top, in the neighborhood of 240 months.

21 Again I don't subscribe to views about why this case
22 should be treated differently because of the nature of the
23 victims, but on the other hand, remember the enhancements here
24 come at a base offense level of 32 for any kidnapping offense
25 and plus 6 as a result of the fact a ransom was demanded, which

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1 in this case was either the drugs or money for the drugs.

2 Those are the relevant factors to be considered.

3 I think also some weight should be given, part of it
4 by virtue of Criminal History I, but there has to be a
5 recognition here this man came from Colombia, has a family, has
6 7 children, has lived in the United States in an otherwise
7 law-abiding life, is a U.S. Citizen, has paid taxes, had a
8 business, lost a business, you know.

9 This is one man who is of some talent and of some
10 education who has made a life for himself and his family, as I
11 believe the letters that your Honor has received from family
12 members and friends reflect, and I understand your Honor gets
13 letters similar to that.

14 THE COURT: Believe me, those were important letters
15 and I was very, very pleased you submitted them and I was moved
16 by a number of them.

17 MR. RAY: I have nothing more than that.

18 THE COURT: Let me hear from the government.

19 MR. MILLER: Thank your Honor.

20 A few points, your Honor. I would like to address the
21 3553 (a) factors in a second, your Honor, but if I may just to
22 preserve for the government's argument if there is an appeal on
23 the record, with respect to, and this is a little unorthodox,
24 but this has been raised by the defense regarding plea
25 discussions. It is important to note, as we did in our

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1 submission that even after it became clear, putting aside what
2 happened in the sealed proceedings which we the government do
3 know not about, but putting that aside for a moment, we, in
4 fact, offered just the narcotics conspiracy and the kidnapping
5 charges to the defendant.

6 This was a plea agreement that was submitted on
7 February 22nd after the government opened and the defense
8 rejected it. They may have rejected it because they didn't
9 like the guidelines. That is fine. It is important to note
10 for the record on appeal it is not at as if the government
11 never offered to drop the 924 (c).

12 THE COURT: I appreciate your saying that, but I also
13 think any such appeal about the guideline calculation would be
14 frivolous because the sentence that I intend to impose would be
15 the same whether I gave credit for acceptance of responsibility
16 or didn't give credit for acceptance of responsibility.

17 The guideline range, if I had given the two points
18 which I think is really the maximum that you could ask for
19 under the acceptance of responsibility, would have been 360 to
20 life. If that had been the guideline range, I assure you it
21 would make no difference in the sentence I intend to impose.

22 MR. MILLER: Thank your Honor.

23 With respect to 3553 (a), I will make a couple of
24 points. We obviously discussed this at length in our
25 memorandum. I would like to note a few things that actually

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Sentence

1 your Honor touched upon just now, and that is the nature and
2 circumstances particularly of this offense. This obviously
3 involved a very significant violent offense. I am somewhat
4 troubled by the suggestion that Mr. Garcia didn't even
5 anticipate that anything would happen past a threat,
6 considering the fact that the victim was kidnapped at gunpoint
7 in Philadelphia and brought to the basement of a building in
8 Queens and held there for ransom, meaning the drugs or the
9 money. And even if one was to put --

10 THE COURT: Besides, when one goes down the road of
11 kidnapping, by the the very nature of the crime, the risk of
12 serious violence is, of course, present even without guns.

13 The argument is being responded to is tantamount to
14 saying ah, well, I drove my car at 100 miles an hour into a
15 group of people but I didn't intend to kill anyone. This is I
16 think the classic definition of reckless disregard.

17 You set out to Kidnap someone, and it is all part of
18 the narcotics world famous for its violence, the likelihood
19 that it is going to be equivalent of an unpleasant business
20 meeting is zero, and the risk of violence is always present.

21 MR. MILLER: Absolutely. That was going to be one of
22 my points. As your Honor is well aware, even putting aside
23 some of the cooperator testimony here at this trial which the
24 government would submit was credible and the government would
25 submit --

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Sentence

1 THE COURT: The court found the government's evidence
2 totally credible.

3 MR. MILLER: Thank your Honor.

4 The calls indicate, including from Mr. Garcia, that
5 Mr. Garcia, when discussing this matter with Jeffrey, indicated
6 look, you're the one who got us all into this mess, you've got
7 your family into this mess. It was a call in which he said
8 that.

9 Given the fact that, as your Honor noted, this is a
10 kidnapping involving narcotics, that guns were going to be
11 used -- in fact, Mr. Garcia while he was not convicted and
12 acquitted on the 924 (c) count, the government did present
13 testimony he was certainly present at a minimum.

14 THE COURT: Let me ask you this.

15 Forgive me for interrupting, but I have another matter
16 after this one and I need to move this along a little bit. The
17 thing that gives me the most pause is the sentence that Judge
18 Sullivan imposed. How do you compare Mr. Garcia with
19 Mr. Batista?

20 MR. MILLER: That was one of the points I was going to
21 get to.

22 THE COURT: Get to it now.

23 MR. MILLER: Unwarranted sentencing disparity? That
24 was a considerable reduction off the guidelines. I don't
25 recall the exact guidelines, offhand but I remember they were

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Sentence

1 in the 300 some-odd range, if memory serves me correctly?

2 THE COURT: Yes.

3 MR. MILLER: Judge Sullivan noted it was a significant
4 discount off the guidelines as a non-guidelines sentence. The
5 government believes that, as it presented at trial, that Mr.
6 Garcia was above, if you will, in the organization Mr. Batista.
7 Mr. Batista was Mr. Garcia's essentially right-hand guy, and
8 for the purposes of both the narcotics conspiracy in which he
9 was convicted and the kidnapping conspiracy he was convicted,
10 Mr. Garcia was directing this and had just as much a leader
11 position at a minimum of kidnapping. Certainly with respect to
12 the narcotics conspiracy he was above Mr. Batista. I don't
13 think there is any real dispute as to that, that Mr. Garcia
14 needs to be held accountable appropriately and certainly in a
15 way that avoids unwarranted sentencing disparity.

16 THE COURT: Let me ask you one other question, which
17 is what about the defense request for a 11-month credit under
18 Section 5G 13 because of his incarceration or custody in
19 Queens?

20 MR. MILLER: The government agrees with the Probation
21 Office on this, that Mr. Garcia should not be credited for that
22 time because he is in state custody for unrelated conduct.
23 Obviously, the judge has discretion on this, but we make the
24 point we don't believe he should be credited this time on that
25 amount.

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Sentence

1 THE COURT: All right. Is there anything the
2 defendant wishes to say?

3 MR. RAY: Your Honor, can I just fill in the record?

4 THE COURT: Yes, of course.

5 MR. RAY: Judge Sullivan's sentencing range was, I
6 think, included in the justification section of the probation
7 office's addendum, page 22.

8 THE COURT: I have it here. It was in the upper 300s.

9 MR. RAY: 376.

10 THE COURT: 376 to 449.

11 MR. RAY: To 449.

12 THE COURT: Yes.

13 MR. RAY: I think that comes probably as a result of
14 60 month consecutive counts on the weapons charges added to
15 whatever the applicable sentencing calculation was on the
16 kidnapping charge.

17 Again, I have made the point, I just want it to be
18 clear, we think a sentence in excess of Mr. Batista's sentence
19 for Mr. Garcia is excessive. Specifically, in that regard
20 addressing the factor of unwarranted sentencing disparity, I
21 think your Honor should take account of the theme that we had
22 throughout this case. Narcotics were brought to the table by
23 my client, but what accounted for the kidnapping facts, the
24 things that occurred in Philadelphia and then back to New York,
25 were at Mr. Batista's direction: His vehicle, his trap, his

C5tQgarS2

Sentence

1 guns and his people. That's why the sentence for Mr. Batista
2 is warranted and should be longer. Mr. Garcia's sentence above
3 that, we believe, is excessive and not warranted.

4 THE COURT: All right. Did Mr. Garcia want to say
5 anything?

6 MR. RAY: Yes.

7 THE COURT: Let me hear from Mr. Garcia.

8 MR. RAY: I believe he has a written statement if I
9 can hand it up to the Court.

10 THE COURT: He can just read it aloud. It probably
11 makes more sense.

12 THE DEFENDANT: Your Honor --

13 THE COURT: Hold on while it's translated.

14 THE DEFENDANT: Your Honor, I wish to apologize to you
15 and to the American people for the bad actions which I have
16 committed.

17 THE COURT: Let me hear the translation.

18 THE DEFENDANT: Before God, you are the person who in
19 his name will deal with me, and that is why I ask God to fill
20 you with blessings, so that your Honor will be as benevolent as
21 possible, bearing in mind that I have a family to take care of.
22 These actions which I have committed cause me very much shame
23 and sadness as this is not the best example that I would like
24 to set for my children. I hope that I can count on you to give
25 me one more chance to prove to you and to the American society

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Sentence

1 and to my family how remorseful I am and to show you all that
2 God has taught me since I've been deprived of my liberty.
3 Thank you very much.

4 THE COURT: Thank you.

5 Well, I think that it's somewhat hard to compare
6 Mr. Batista and Mr. Garcia. In some ways each could be said to
7 be worse than the other. It depends what you focus on. But in
8 the end, I am persuaded that while there must be a
9 non-guideline sentence here for many of the reasons set forth
10 by able defense counsel, that somewhat more punishment is
11 required than was meted out to Mr. Batista because I really
12 cannot escape the conclusion based on the trial that above all
13 was Mr. Garcia, and so the sentence of the Court is that the
14 defendant is sentenced to 280 months in prison to be followed
15 by five years of supervised release on terms I will get to in a
16 minute. No fine will be imposed because the Court makes a
17 finding that the defendant is not in a position to pay any
18 meaningful fine now or in the foreseeable future. There is,
19 however, a \$300 mandatory special assessment that must be paid.

20 I should mention before I go further that I have
21 chosen not to adopt the defense counsel's suggestion for the
22 eleventh month departure. I agree with the probation office
23 that that is not warranted.

24 The terms of supervised release are that defendant
25 shall not commit any other federal, state or local crime; that

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Sentence

1 defendant shall not illegally possess a controlled substance;
2 that defendant shall not possess any firearm or destructive
3 device; that the defendant shall cooperate in the collection of
4 DNA. However, the fifth mandatory condition, the drug testing
5 condition, is suspended due to the imposition of a special
6 condition instead that I will get to in a moment. There will
7 also be imposed the standard conditions of supervision 1
8 through 13. They appear on the face of the judgment and will
9 be gone over with the defendant by the probation office when
10 the defendant reports to begin his period of supervised
11 release.

12 Finally, there are special conditions: First, the
13 defendant will participate in an approved program for substance
14 abuse and alcohol abuse on the standard terms and conditions.

15 And, second, that the defendant within 72 hours of his
16 release from custody will report to the nearest probation
17 office, and he will be supervised by the district of his
18 residence.

19 Now, before I advise the defendant with respect to his
20 right of appeal, is there anything else we need to take up?

21 Anything from the government?

22 MR. MILLER: Just that we are going to move to dismiss
23 open counts.

24 THE COURT: All open counts, if any, are dismissed.

25 MR. MILLER: Thank you.

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Sentence

1 MR. RAY: Your Honor, there is a distinction between
2 the departure that we asked for under 5G1.53 that your Honor
3 now has ruled upon. Mr. Garcia also is concerned about credit
4 for federal time served. I had assured him that that will be
5 accounted for by the Bureau of Prisons, but I wanted the record
6 to be clear.

7 THE COURT: Yes.

8 MR. RAY: In other words, he was in federal custody
9 beginning in November of --

10 THE COURT: Yes, whenever he went into federal
11 custody, he gets full credit as you rightly told him.

12 MR. RAY: Finally, I would ask, for Mr. Garcia's
13 benefit and for the benefit of his family, in view of the fact
14 that there are young children and travel issues involved, if
15 your Honor would recommend to the Bureau of Prisons -- I
16 understand it's not binding -- a facility close to the New York
17 City area.

18 THE COURT: Yes, I will recommend that. I cannot
19 order that, but I will recommend it.

20 MR. RAY: That's it. Thank you.

21 THE COURT: Mr. Garcia, you have a right to appeal the
22 sentence. Do you understand that?

23 THE DEFENDANT: OK, sir.

24 THE COURT: And if you can't afford counsel for the
25 appeal, the Court will appoint one for you free of charge. Do

C5tQgarS2

Sentence

1 you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Very good.

4 Thanks very much.

5 (Adjourned)

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